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In The

Supreme Court of the United States

O.T. 1979

No. 79-198

SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC., *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF AMICUS CURIAE ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF THE JURISDICTIONAL STATEMENT

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
312/372-2345
Attorney for Amicus Curiae

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OPINIONS BELOW

The majority and minority opinions of the three-judge court for the Eastern District of Virginia from which this appeal is taken are not yet reported. They are reproduced at Appendix 2 to Appellants' Jurisdictional Statement. An earlier opinion in this case is reported *sub. nom. Consumers Union* v. *American Bar Association,* 427 F.Supp. 506 (E.D. Va. 1976), *vacated and remanded,* 433 U.S. 917 (1977).

JURISDICTION

The jurisdiction of this Court attached under 28 U.S.C. § 1253. The three-judge court below was invoked prior to the repeal of 28 U.S.C. § 2281. See 28 U.S.C. § 2284 note. The judgment of the three-judge court from which the appeal is taken was entered on 8 May 1979. Notice of appeal was timely filed on 7 June 1979.

INTEREST OF THE AMICUS CURIAE

The Conference of Chief Justices came into existence twenty years ago under the aegis of the Section of Judicial Administration of the American Bar Association. Its membership is made up of the presiding judicial officer of the highest court of each of the States of the Union. Its concern is with the administration and improvement of the court systems over which each of its members presides and with the relation of these systems to the federal judiciary. This case, in which this Court is called upon to delineate important features of the long-standing doctrine of judicial immunity, touches on matters of great urgency and importance to each of the members of the Conference and to the Conference as a medium through which its membership seeks to improve the effectuation of the judicial business of the States. The judgment in this case will affect directly the capacities of every judge in the Nation—State and federal—to perform his or her judicial duties.

LETTERS OF CONSENT

Counsel for the Appellants and the Appellees have granted consent to the amicus curiae here to file this brief in support of the Appellants' jurisdictional statement. The letters of consent have been filed in the Office of the Clerk of this Court.

STATUTE AND RULE INVOLVED

42 U.S.C. § 1988 reads in relevant part;

> In any action to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs. [Act of Oct. 19, 1976.]

Virginia Code of Professional Responsibility, DR 2-102, reads in relevant part:

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in a dignified form: . . . (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or firm specializes in a particular field of law or law practice but only if

authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; foreign language ability; names and addresses of references, and, with their consent, names of clients

QUESTIONS PRESENTED

1. May a federal court impose attorneys' fees on a state court or its Justices when the state court and its Justices were neither necessary nor proper parties to the lawsuit?
2. Do the Virginia Supreme Court and its Justices enjoy absolute immunity from suit for actions taken within the perimeters of their judicial duties?
3. Could Congress and did Congress provide for infringement of judicial immunity in its amendment of 42 U.S.C. § 1988?
4. Does the immunity of the Supreme Court of Virginia and its Justices fail because the promulgation of court rules is a legislative and not a judicial function?

STATEMENT

This action was commenced by the Consumers Union of the United States and the Virginia Citizens Consumers Council (Appellees), two private, not-for-profit organizations, against the American Bar Association, the Virginia State Bar, its president and the chairman of its Legal Ethics Committee, the Supreme Court of Virginia and its Chief Justice (the last two are the Appellants). The complaint sought a declaratory judgment that Appellees had been de-

prived of their constitutional rights to secure data from Virginia lawyers for publication in a directory because the provisions of the Virginia Code of Responsibility limited information that a Virginia lawyer could make available for such a directory, and particularly facts about his fees and charges. The complaint also sought an injunction against enforcement of the Code, not against Appellees who were not subject to the Code but against Virginia lawyers not parties to the action, the only ones subject to the terms of the Code. No member of the Virginia Bar was a party plaintiff.

The Virginia State Bar is an integrated bar and is the organ charged with administration and enforcement of the Virginia Code of Professional Responsibility through its Legal Ethics Committee. It initiates complaints, conducts investigations, holds hearings, and determines whether to seek judicial sanctions against recalcitrant members of the Bar by way of adversary judicial proceedings.

The Virginia Supreme Court promulgated the challenged Rule pursuant to the authority vested in it by § 54-48 of the Virginia Code. Neither the Virginia Supreme Court nor any of its Justices has any responsibility for enforcement of the Rule except in the course of judging cases that come before it as the result of adversary proceedings instituted by the Virginia State Bar, or by way of petitions to it in its judicial capacity.

In December, 1976, the three-judge United States District Court for the Eastern District of Virginia handed down its decision in favor of Appellees, granting the declaratory judgment and injunction sought. 427 F. Supp. 506 (1976). The district court was divided. Judge Merhige wrote the "majority" opinion, essentially finding the case governed by this Court's then recent opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425

U.S. 748 (1976), and holding that no distinction could be drawn between publication of pharmacists' price lists and lawyers' "price lists." Judge Warriner could not "concur with that portion of the [Merhige] opinion which permits advertising for any service other than for an initial consultation of a specified length of time." *Id.* at 531. Judge Albert Bryan dissented on the ground that suit could not lie against the Supreme Court of Virginia in the federal district court on the premises of this case.

The district court judgment was appealed to this Court and held for disposition pending this Court's determination of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). That case, of course, involved no question of the propriety of suit against a State's high court. The Supreme Court of Arizona was not a party to the proceedings, except that it was the court whose judgment was being reviewed in the ordinary course.

The holding in *Bates,* by a sharply divided Court, was not expansive. As the Court said in its conclusion, 433 U.S. at 384:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

This Court obviously did not regard its disposition of *Bates* as dispositive of the issues in this case. The Court did not affirm the trial court's judgment then here on appeal. Instead, it vacated the judgment and remanded the case for reconsideration. 433 U.S. 917 (1977).

On remand, the defendants stipulated that there was no objection to the publication of the Appellees' directory with the fee information. The trial court proceeded to hold hearings on the question of attorneys' fees. It then rendered its opinion and the judgment from which this appeal is taken. Finding the case to be one brought under 42 U.S.C. § 1983, the district court found authority for imposing attorneys' fees on the Appellants in the recently enacted amendment to 42 U.S.C. § 1988.

The trial court seemed to believe that it could find justification for the imposition of these not insubstantial fees—Appellees claim an amount in excess of $121,000 as attorneys' fees—on the Supreme Court and its Chief Justice, on the newly announced ground that the Supreme Court of Virginia had failed to enact a new Rule to govern lawyer's advertising. This failure by the Virginia Supreme Court to promulgate a new court rule was to be penalized by the imposition of attorneys' fees. The issue of a new rule was, of course, not one raised by the pleadings or addressed by the evidence. This attempt to become the overseer of the State high court's operations was simply another act of supererogation on the part of the federal district court.

The case on appeal thus presents many substantial questions about the legitimacy of federal court oversight of state judicial operations other than by way of judicial review, and not least with regard to the proper measure of judicial immunity. The questions raised are important ones not heretofore directly resolved by judgments of this Court. In light of the holdings of this Court in *Davis* v. *Passman,* ..... U.S. ....., 99 S.Ct. 2264 (1979), and *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), that causes of action may arise directly under the Constitution, without the need for statutory provisions like 42 U.S.C. § 1983, the issues raised here are as relevant to federal judicial immunity as to state ju-

dicial immunity. See *Butz v. Economou,* 438 U.S. 478 (1978).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

May A Federal Court Impose Attorneys' Fees On A State Court Or Its Justices When The State Court And Its Justices Were Neither Necessary Nor Even Proper To The Lawsuit?

Antecedent to the fundamental questions about judicial immunity is the question whether, on the facts of this case, the Supreme Court of Virginia and its Chief Justice could properly be charged with attorneys' fees. The complaint sought (1) a declaration of the constitutional invalidity of DR 2-102 and (2) an injunction to prevent its enforcement against Virginia lawyers who would supply the data sought by Appellees for publication in their "directory." The district court order (Appellants' Jurisdictional Statement, App. 1) held the Rule "unconstitutional on its face" and enjoined its enforcement. The Supreme Court and its Chief Justice were neither proper nor necessary parties to the relief sought or the relief granted. The Appellants were the promulgators of the challenged rule and not its administrators. A declaration of the Rule's invalidity or an injunction against its enforcement would not invoke or require any action or inaction on the part of the Virginia Supreme Court or its Justices.

As Judge Friendly pointed out in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117, 124 (S.D.N.Y. 1969), *aff'd,* 401 U.S. 154 (1971): "While plaintiffs' attack on the 'statutory scheme' governing admission to the bar takes in a Rule of the [N.Y.] Court of Appeals, Rule VIII, the involvement of that rule does not necessitate joinder of its authors any more than an attack on the application of a statute requires joinder of the legislature. . . . There is no practical obstacle to adjudication of the constitutionality of this procedure in the absence of the Court or its members."

There, as here, the administration of the Rule in question lay elsewhere than in the high state court. There the enforcers of the Rule were the members of the Appellate Division. Here the enforcement of the Rule is vested in the State Bar. Full and complete relief could be afforded in both cases without invoking the State's high court or its judges as parties defendant. None of the relief sought or granted called for action by the Supreme Court of Virginia or its Justices. Since the Appellants were neither necessary nor proper parties to the litigation, it would seem clear that they should not be charged with costs, no less attorneys' fees, simply because the Appellees were successful in securing the relief they sought. Just as the legislature is not an appropriate defendant in a suit to declare unconstitutional any statute enacted by it; just as the President is not an appropriate party defendant in a suit to declare unconstitutional and enjoin the enforcement of an Executive Order, see, *e.g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); just as this Court is not an appropriate party defendant in a suit contesting the validity of a Federal Rule of Civil Procedure promulgated by it, see, *e.g., Hanna* v. *Plumer,* 380 U.S. 460 (1965); *Gold Metal Process Co.* v. *United Engineering & Foundry Co.,* 351 U.S. 445 (1956); *Sears Roebuck & Co.* v. *Mackay,* 351 U.S. 427 (1956); *Mississippi Pub. Corp.* v. *Murphree,* 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co., Inc.* 312 U.S. 1 (1941), so, too, the judicial promulgator of a judicial Rule in Virginia is an inappropriate defendant in a suit to have the Rule declared unconstitutional and its enforcement enjoined.

II.

Do The Virginia Supreme Court And Its Justices Enjoy Absolute Immunity From Suit For Actions Taken Within The Perimeters Of Their Judicial Duties?

This Court, in *Butz* v. *Economou,* 438 U.S. 478 (1978), reiterated the longstanding doctrine that judges in the performance of their official functions enjoyed absolute immunity from suit, although executive officials may have only a qualified immunity. Neither the majority opinion in *Butz, id.* at 511-12, nor the minority opinion, *id.* at 528 n.*, had expressed any doubts that judicial officers or those engaged in the judicial function were entitled to absolute immunity.

Absolute immunity can mean only immunity from being sued, not merely from sanctions in the event that a suit were to prove successful. In an expression of the rule of absolute immunity for judicial officials, Judge Learned Hand, in *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2d Cir. 1948), expressed its rationale in words often quoted by this Court and others:

> The justification for [absolute judicial immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the

> answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

This Court in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), recently reiterated the validity of the doctrine of absolute judicial immunity in a case where the facts pushed the doctrine to its limits. In doing so, the Court announced, *id.* at 355-56:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley* v. *Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson* v. *Ray,* 386 U.S. 547 (1967).

The suit in issue here was nevertheless allowed to be brought under 42 U.S.C. § 1983 against judicial officials. It must be conceded that, despite the plain rule established by this Court that judicial immunity is applicable to § 1983 cases, some lower federal courts since the late 1960's have

condoned equity suits against judges under § 1983, as distinguished from suits for damages. See, *e.g., Person* v. *Ass'n of Bar of City of New York,* 554 F.2d 534, 537 (2d Cir. 1977), *cert. den.,* 434 U.S. 924 (1977); *Littleton* v. *Berbling,* 468 F.2d 389, 406-07 (7th Cir. 1972), *rev'd on other grounds, O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Law Students Civil Rights Research Council* v. *Wadmond,* 299 F. Supp. 117, 123 (S.D.N.Y. 1969), *aff'd on other grounds,* 401 U.S. 154 (1971); *United States* v. *McLeod,* 385 F.2d 734, 738 (5th Cir. 1967). Prior to *McLeod,* and sometimes since, the rule of judicial immunity has been held to encompass all suits under § 1983, whether equity actions or damage claims. See, *e.g., Adkins* v. *Underwood,* 370 F. Supp. 510 (N.D.Ill. 1974), *aff'd,* 520 F.2d 890 (7th Cir. 1975), *cert. den.,* 423 U.S. 1017 (1975); *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974); *Mackay* v. *Nesbett,* 285 F. Supp. 498, (D. Alaska 1968), *aff'd,* 412 F.2d 846 (9th Cir. 1969), *cert. den.,* 396 U.S. 960, (1969); *Gay* v. *Heller,* 252 F.2d 313 (5th Cir. 1958); *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Peckham* v. *Scanlon,* 241 F.2d 761 (7th Cir. 1957); *Tate* v. *Arnold,* 223 F.2d 782 (8th Cir. 1955); *Mirin* v. *Justices of the Supreme Court of Nevada,* 415 F. Supp. 1178, 1192 (D.Nev. 1976).

This Court has not approved any such change. And, with all respect, the lower courts have afforded no basis for distinguishing the two kinds of actions within the rationales for the rule of judicial immunity announced by this Court. To say that judges may not be harassed by actions for damages, but may be harassed by actions for injunctions is a gross and unwarranted infringement of the recognized doctrine. Nor is the argument that in the absence of such a cause of action against judges some plaintiffs would be denied protection of their civil rights a cogent one. First, that is the same argument that has been made and rejected with regard to dam-

age actions. Second, it is factually unsound. In none of the cases, and certainly not this one, see point I *supra,* would plaintiffs be without remedy for a constitutional wrong if they were not free to bring suit against judicial officers for actions taken in the course of their duties.

The result of the new rule of the lower Federal Courts is that judges' pocketbooks are to be protected, but their judicial functions are to be subject to interference. In any event, the issue is one of sufficient importance to warrant this Court's clarification of the governing rule, especially in the light of conflicting decisions in the lower courts.

III.

Could Congress And Did Congress Provide For Infringement Of Judicial Immunity In Its Amendment Of 42 U.S.C. § 1988?

Event if the lower federal courts were right in holding that equity actions against judges under § 1983 are free from the defense of judicial immunity, it is clear that imposing monetary sanctions on judges for defending their judicial behavior would fall afoul the concept of judicial immunity as a protector of the judges' purses if not their independence. The court below, however, determined that the amendment to § 1988 was a legislatively authorized invasion of this judicial immunity.

The exact issue in this case is whether a district court of the United States can, consistently with the law of judicial immunity, levy an assessment on the Supreme Court of Virginia and its Chief Justice approximating $121,000. There can be no doubt from reading the opinion of the court below that the "fees" were assessed as punishment on the Virginia Supreme Court, and essentially as punishment for failing to amend a Supreme Court Rule to the liking of the federal district judge. There was, of course, no need to amend the

Rule to afford the plaintiffs relief. The declaration of unconstitutionality and injunction against enforcement gave plaintiffs all that they could or did demand. So far as the doctrine of judicial immunity is concerned, it should matter little whether the judicial defendants are mulcted in the name of damages or in the name of attorneys fees: the danger to judicial independence is the same.

The court below however, assumed that the amendment to § 1988, because it was not qualified in its terms and because there was a reference in the House of Representatives report to damage cases against public officials affording a basis for counsel fees, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976), that judicial immunity was equally impaired. Of course, the House Report could not have referred to suits for damages against judicial officers because such suits have been precluded by the doctrine of judicial immunity at least since 1872. Equally important, the fact is that it was not the House Bill but the different Senate version that became law. And the Senate Report makes quite clear that no such major revision as an impairment of judicial immunity was contemplated. "The bill created no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which has been going on for years prior to the Court's May decision [in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975)]" S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

There is no suggestion in the legislative history any more than in the language of the law that Congress intended to affect the scope of judicial immunity. And so, as this Court reasoned in *Pierson* v. *Ray,* 386 U.S. 547, 554-55 (1967):

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

As the Court said in *Pierson*: "Since our decision in *Tenney* v. *Brandhove, supra,* the courts of appeals have consistently held that judicial immunity is a defense to an action under § 1983." 386 U.S. at 555 n.9. And this has remained so, with the exceptions noted above, to this day. Congress must have been cognizant of the existence of the doctrine and it is reasonable to "presume that Congress would have specifically so provided [in § 1988] had it wished to abolish the doctrine."

There is an additional reason to construe the statute as not having amended the immunity of judges against imposition by litigants who sue them because of the performance of their judicial duties. To read the statute otherwise than as preserving judicial immunity would raise serious questions about its constitutionality. The absolute immunity of judges derives from the same source as the qualified immunity of Presidents to maintain the confidentiality of their papers. See *United States* v. *Nixon,* 418 U.S. 683, 705-07 (1974). The constitutional doctrine of separation of powers would seem to preclude legislative incursion on the independence of the judiciary by this means. Moreover, as the Court of Appeals for the Third Circuit, sitting *en banc,* in *Bauers* v. *Heisel,* 361 F.2d 581, 588-89 (3d Cir. 1966), wrote:

Article 4, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government***." The framers of the Constitution clearly evidenced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government. The language of the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L. Ed. 646, lends support to our conclusion.

"***[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*" (Emphasis added.)

Thus, a construction of the statute wholly in keeping with its language and legislative history that judicial immunity was not to be infringed by the imposition of attorneys' fees on judges would avoid the necessity for reaching the constitutional questions.

IV.

Does The Immunity Of The Supreme Court Of Virginia And Its Justices Fail Because The Promulgation Of Court Rules Is A Legislative And Not A Judicial Function?

If it is suggested, as Judge Warriner did in the court below, that the rulemaking function of the Supreme Court of Virginia is a legislative and not a judicial function, it is apparent that the same consequences should flow from absolute legislative immunity as would from the absolute judicial immunity. *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Butz* v. *Economou,* 438 U.S. 478, 508-14 (1978). The argument in support of this position is cogently made by Judge Warriner in his dissent below and need not be reiterated here.

CONCLUSION

This case presents questions of fundamental importance to the maintenance of the independence of the judicial branch of government. This Court should note probable jurisdiction and determine these issues.

Respectfully submitted

PHILIP B. KURLAND,
Two First National Plaza
Chicago, Illinois 60603
312/372-2345

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, certifies that three copies of the Brief *Amicus Curiae* of the Conference of Chief Justices have been served on counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 17th day of August, 1979, as follows:

The Honorable Marshall Coleman
Attorney General of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Mr. Mark Silbergeld
Ms. Ellen Broadman
Consumers Union
1714 Massachusetts Avenue
Washington, D. C. 20036

Mr. James W. Benton, Jr.
Hill, Tucker & Marsh
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261

The Honorable Daniel R. McLeod
Attorney General of South Carolina
Hampton Office Building
Columbia, South Carolina 29211

All parties required to be served have been served.

WALTER H. RYLAND
Chief Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071